

In the Matter of License No. 182674 and the Seaman's Documents No.

Issued to: COLTON D. MARSHALL

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1124

COLTON D. MARSHALL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 12 May 1959, an Examiner of the United States Coast Guard at Portland, Oregon suspended Appellant's seaman documents upon finding him guilty of misconduct. The two specifications allege that while serving as Third Assistant Engineer on board the USNS MISSION SAN GABRIEL under authority of the document above described, on or about 13 and 14 August 1957, Appellant wrongfully failed to perform his assigned duties; on or about 26 August 1957, Appellant deserted his ship.

At the hearing, Appellant was represented by counsel of his own choice. He entered a plea of not guilty to the charge and each specification.

The Investigating Officer and Appellant's counsel stipulated in evidence numerous documents including certified copies of entries in the ship's Official Logbook, medical evidence concerning Appellant's claimed hearing disability, a sworn statement by Appellant, statements under oath by three other members of the crew, a copy of a letter from an American Vice Consul advising appellant to obtain his discharge if dissatisfied with the conditions on the ship, a copy of appellant's letter of protest to the same American Vice Consul concerning the condition of the ship and a copy of Appellant's authorization for medical treatment.

After considering the evidence, the Examiner rendered the decision in which he concluded that the charge and two specifications had been proved. An order was entered suspending all documents, issued to Appellant, for a period of six months.

FINDINGS OF FACT

Between 20 June and 26 August 1957, Appellant was serving as Third Assistant Engineer on the USNS MISSION SAN GABRIEL and acting under authority of his License No. 182674. This M.S.T.S. ship was on a foreign voyage for which Shipping Articles had been signed by Appellant at Honolulu.

On 13 and 14 August 1957 while the ship was at Naha, Okinawa, Appellant failed, without permission, to report on board during working hours. As a result, Appellant did not perform his assigned duties during the day work hours on these two days.

The ship arrived at Sasebo, Japan on Wednesday, 21 August 1957. At some time prior to 1700 on 22 August, appellant removed his license from the engineers' license rack where it was required to be posted. There is evidence to indicate that this was done by appellant in anticipation of leaving the ship because the engineering equipment on the ship was in need of repairs. The boilers leaked and the generators caused an excessive amount of noise.

On 23 August, Appellant consulted with the American Vice Consul at Fukuoka, Japan. Appellant indicated his desire to file a complaint concerning certain conditions on the ship. The Vice Consul informed the Master of the ship and gave Appellant a letter advising him to obtain his discharge if conditions on board were not satisfactory to Appellant.

On 24 August, Appellant and other crew member filed an official protest with the same American Vice Consul stating the conditions which they alleged caused the ship to be unseaworthy. The two seamen stated that they desired to leave the ship in order to prevent damage to their hearing and to otherwise protect their health. The record does not disclose that the American Vice Consul ever took any action on this request to discharge the two seamen other than the letter of 23 August which he had given to Appellant.

At 1315 on the same day, Appellant gave a copy of the protest to the Master while at the ship agent's office and stated that Appellant would not return to the ship. On this and prior occasions, the Master refused to permit Appellant to sign off the Shipping Articles by mutual consent. At this time, the Master advised Appellant that he would be classed as a deserter unless it was found that the ship was not in a safe condition (unseaworthy) or Appellant obtained a medical affidavit that he was not fit for duty.

While at the agent's office, Appellant obtained a letter of authorization for medical examination at the U.S. Navy Hospital in Sasebo. Appellant went to the hospital on 24 August to have his ears examined but was told to return in two days.

About 1600 on 24 August, a representative of the American Bureau of Shipping completed a survey of the ship's boilers and generators in accordance with the Master's request made prior to arrival at Sasebo on 21 August. After examining the boilers and generators in operation, the A.B.S. representative, Willard H. Hansen, concluded that this equipment was satisfactory and recommended that the ship retain her present class with the A.B.S. (No further particulars as to this examination are contained in the record.)

At 1600 on Monday, 26 August, the ship departed Sasebo. Appellant was not on board and all his personal belongings had been taken off the ship. The voyage was completed on 11 October 1957.

Appellant did not have his ears examined at Sasebo. He did not have them examined anywhere until 26 September after he had returned to Honolulu. The documentary medical evidence from three sources is in agreement that Appellant suffers from some degree of hearing loss in high tones but that there is no indication of physical damage to Appellant's ears. None of the reports refer to any treatment for this conditioner the ringing in his ears which Appellant reported to the physicians.

Appellant's prior record consists of a six months' suspension in 1955 for sleeping on watch, the use of threatening language and striking a crew member of a vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the decision is unfair because he left the ship only after the Master refused to discharge Appellant by mutual consent and when it became impossible for him to stand watches on the operating platform due to the excessive noise made by the generators. Appellant suffered from loss of hearing and ringing in his ears. The latter condition still exists. Appellant was unable to have his ears examined on 24 August but did so as soon as possible at Honolulu. (Appellant mentions various other matters that are points of evidence which should have been brought out at the hearing.)

Concerning 13 and 14 August, Appellant thought that he had the time off, and he was fined two days' pay for each day.

It is requested that this be considered a plea for dismissal of the charges since Appellant was required to leave the ship in order to protect his health.

OPINION

With respect to Appellant's failure to perform his assigned duties on 13 and 14 August, it is sufficient to state that he was properly logged for these two offenses and the Examiner did not accept Appellant's explanation that he did not think he was required to be on board the ship on these dates. The fact that the statutory forfeiture of wages under 46 U.S.C. 701 was imposed by the Master does not preclude this hearing for the same offense. Since Appellant's conduct was unauthorized, it was wrongful.

concerning the more serious allegation of desertion, Appellant has intermingled the two defenses of unseaworthiness of the vessel and fear for his health in an attempt to justify his departure from the ship. A satisfactory definition of desertion by a seaman is the abandonment of duty by quitting the ship before the termination of the engagement, without justification and with the intention of not returning. The City of Norwich (C.C.A. 2, 1922), 279 Fed. 687. A necessary element of desertion is the intent to abandon the ship without justification or, in other words, without reasonable cause. Bearing on the aspect of reasonable cause, the courts have placed considerable emphasis on

the binding effect of the Shipping Articles for a voyage. It has been stated that it is a contract which should be lived up to scrupulously by both the owner and seaman (Rees V. United States (C.C.A. 4, 1938), 95 F. 2d 784) and which requires the crew "to stand by the ship and obey the master until the voyage be done, unless she come to such a pass as to be dangerous to human life." The CONDOR (D.C.N.Y., 1912), 196 Fed. 71. Hence, it was necessary for Appellant to assume the burden of proving that he had reasonable grounds to believe that he would have been in danger of grave bodily harm, if he had remained on the ship, in order to justify his leaving.

Based on these standards, I agree with the Examiner's conclusions that there is no proof that the ship was unseaworthy; Appellant's ear trouble was not justification for his abandonment of the voyage; and Appellant was guilty of desertion.

There is not doubt about Appellant's intention of not returning to the ship. This is established by his sworn statement in evidence and is not contested on appeal. Other evidence of this was the removal, by Appellant, of his license and personal belongings from the ship. The only issue to resolve is the matter of justification or lack of it.

Appellant raised the issue of unseaworthiness in his written protest the american Consul on 24 August but this possibility was considerably discounted by the results of the survey which was conducted on board the ship by the A.B.S. representative on 24 August. The survey's conclusion that the ship was seaworthy is corroborated by the sworn statements in evidence of three other members of the crew and the failure of the Vice Consul to require Appellant's discharge on the basis of such a request in his protest.

An American consular officer may discharge a seaman on account of unseaworthiness of a vessel under 46 U.S.C. 658 or otherwise as provided for in 46 U.S.C. 682. See Commandant's Appeal Decision No. 608, pp. 14-15. The record in the case under consideration does not show that the Vice Consul took any action other than giving Appellant a letter advising him to obtain his discharge is not satisfied with the conditions on the ship. This cannot be considered as a proper discharge by the Vice Consul since it left the determination up to the seaman. The consular officer must direct the Master to discharge a seaman in order for it to be effective under either of the above two statutes. The Vice Consul did not do this.

There is a presumption in favor of seaworthiness. Commandant's Appeal Decision No. 435, p. 23 and No. 608, p. 17. Appellant not only did not submit any effective evidence to overcome this presumption, but he said in his sworn statement: "I did not consider the vessel to be unseaworthy at any time."

The primary contention on appeal is that Appellant was justified in leaving the ship because Appellant had reasonable cause to believe that if he remained on board, the excessive noise from the generators would cause serious loss of hearing. The implication is that the normal noises in the engine spaces of a ship would not have been harmful to Appellant's ears.

There is no persuasive evidence to support this contention. Again, the Vice Consul failed to act under 46 U.S.C. 682 after Appellant's protest. As stated in the findings of fact above, the medical evidence does not indicate that the two months on the ship, during which Appellant worked considerable overtime, caused any physical damage to Appellant's ears. There is evidence of some loss of hearing with the cause not determined but no evidence of treatment or that the condition would have been worse if Appellant had completed the voyage which ended in less than two months.

Appellant admitted that the Master never refused requests for medical examination. Nevertheless, appellant did not obtain an authorization for examination until 24 August although the ship arrive at Sasebo on 21 August. Appellant went to the Vice consul before making any attempt to obtain treatment for his ears. The protest to the vice consul expressed the desire to avoid anticipated future damage to Appellant's hearing rather than a claim of damage at the time of the protest. Appellant did not return to the Navy Hospital to have his ears examined on 26 August as directed although the ship did not depart Sasebo until 1600 on this date. A further indication of the continued lack of urgency in this matter is shown by the fact that Appellant's ears were not examined until exactly one month after the ship left Sasebo.

All of these factors reflect unfavorably upon the authenticity of Appellant's stated reason for abandoning the voyage on 26 August. In any event, it does not appear that Appellant had a reasonable belief that his hearing ability would have been appreciably affected if he had remained on the ship. On the contrary, his conduct indicates that he was not concerned enough to seek prompt medical examination and treatment. One physician states that Appellant left the ship because he was annoyed by the noise. This does not meet the test required to show justification for disregarding the terms of the Shipping Articles. A seaman can "be excused from breaching his contract only when he can present concrete evidence that he was justified in doing so." Commandant's Appeal Decision No. 614. The situations referred to in Commandant's Appeal Decision No. 1100 and cases cited therein on page 11 are pertinent to the decision reached in this case.

The desertion of a ship by a seaman has always been regarded by the maritime law as very serious misconduct. According to the strict standards which have been set by the courts to justify an abandonment of the vessel by a member of the crew, it is my conclusion that Appellant was guilty of desertion.

ORDER

The order of the Examiner dated at Portland, Oregon, on 12 May, 1959, is AFFIRMED.

J. A. Hirshfreed
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 25th day of November, 1959.